

**SOAH DOCKET No. 582-13-1520  
TCEQ DOCKET No. 2012-2608-AIR**

<b>APPLICATION OF EL PASO ELECTRIC</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
	<b>§</b>	
<b>COMPANY FOR AIR QUALITY</b>	<b>§</b>	<b>OF</b>
	<b>§</b>	
<b>PERMIT NO. 102294/PSD-TX-1290</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**EXECUTIVE DIRECTOR’S REPLY TO ALLIGNED PROTESTANTS’ EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE’S PROPOSAL FOR DECISION**

To: Honorable Administrative Law Judge Richard Wilfong:

Comes Now, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this Reply to the Aligned Protestants’ Exceptions to the Administrative Law Judge’s Proposal for Decision and in support thereof shows the following:

**I. INTRODUCTION**

The ED has reviewed the Aligned Protestants’ exceptions to the administrative law judge’s proposal for decision in the above-referenced contested case hearing. The Aligned Protestants’ exceptions to the Proposal for Decision (PFD) focus on the issues of whether the Administrative Law Judge (ALJ) properly applied the law regarding use of Best Available Control Technology (BACT), whether the air modeling used by El Paso Electric Company (EPE or Applicant) complied with legal requirements, and whether the ruling should have required the addition of preconstruction modeling data to EPE’s permit application. The Aligned Protestants (Protestants) also except to the ALJ’s finding that the Applicant complied with all applicable rules and statutes for an air permit application. The ED disagrees with the Protestants’ exceptions and offers this reply.

**II. BACT**

In the PFD, the ALJ states that El Paso Electric’s proposal to authorize four General Electric LMS100 simple cycle turbine generators controlled with a water cooling tower satisfies BACT requirements. The ALJ’s findings on this matter are in Findings of Fact (FOF) Nos. 32, 101-108, 110-112, 117-119, 123, and 124. The ALJ’s Conclusions of Law (COL) on this matter are in COL Nos. 7, 36, 38, 51, 52, and 54. The Protestants maintain that these FOF and COL are in

error. The Protestants argue that the ALJ should have found that a Dry-Hybrid cooling system is BACT for the turbines.

Specifically, the Protestants argue El Paso Electric and TCEQ should have analyzed a Dry-Hybrid configuration in conjunction with the BACT review. However, the ALJ found that considering the Dry-Hybrid configuration would have constituted a redefinition of EPE's power plant design. TCEQ does not have the authority to require such a redefinition. In addition, the ALJ found that EPE followed all applicable statutes and regulations, and that the TCEQ acted within the bounds of its authority in concluding that EPE's proposed configuration was BACT. The ALJ also agreed with the TCEQ that it does not have the regulatory authority to require one type of facility design over another so long as an applicant can demonstrate that they meet the requirements of a particular authorization.

### **III. AIR DISPERSION MODELING ANALYSIS**

#### **Meteorological Data**

The Protestants disagree with the ALJ's finding that EPE's air dispersion modeling demonstrates the maximum expected air impacts from the plant. The Protestants argue that El Paso Electric used incomplete and outdated meteorological data in its air dispersion modeling demonstration. Specifically, the Protestants argue that El Paso Electric's modeling demonstration failed to include lower wind speeds.

In response to the Protestants' exceptions to the PFD and to the FOF Nos. 32, 40, 43, 45-48, 50-55, 63, 65, 70, 86, 133, 135, 139, 140 and to COL Nos. 7, 8, 12, 17, 19, 22, 39, 46-48, 52-54, the evidence in the record clearly shows that, as explained during the hearing, El Paso Electric used the recommended preprocessed meteorological data set posted on the TCEQ website for the modeling. The modeling protocol was submitted to the TCEQ by El Paso Electric and approved. Additionally, the protocol was sent to EPA for comment, and EPA did not have any comment or concerns regarding the protocol.<sup>1</sup>

The TCEQ has preprocessed newer meteorological data and posted it to the TCEQ website. However, the newer data was not made available until December 2012, approximately four months after the Applicant submitted its modeling demonstration<sup>2</sup>. Therefore, EPE could not have used the data, and the data it did use met TCEQ requirements.

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<sup>1</sup> TR at 474.

<sup>2</sup> Exhibit ED-23 at 447.

In fact, EPE's modeling complied with TCEQ's guidance outlined in RG-25: "The ADMT's goal is to use worst-case assumptions and conditions to conduct the minimum amount of modeling necessary to demonstrate that the modeled sources should not cause or contribute to a condition of air pollution."<sup>3</sup> Although the newer data produced different predicted concentrations, the TCEQ approved EPE's modeling since it did not affect the modeler's opinion that the meteorological dataset used by the Applicant was sufficiently represented of the worst-case meteorological conditions.<sup>4</sup> The TCEQ supports the relevant Findings of Fact and Conclusions of Law in the PFD.

### **Consideration of Secondary PM2.5**

The Protestants object to the ALJ's opinion stated in the PFD that EPE correctly used the recommended meteorological dataset to predict PM2.5 concentrations. However, in response to comment from EPA, TCEQ did evaluate secondary PM2.5 to ensure compliance with the NAAQS. The Protestants argue the ADMT's analysis was flawed and incomplete<sup>5</sup> because the ADMT relied on data from an air monitor without justifying whether it represents the air emissions at the site.<sup>6</sup>

The ED agrees with the ALJ's findings for several reasons, including the fact that the analysis conducted by the ADMT included background concentrations from an ambient air monitor located in the same county as the proposed project. The 24-hour and annual PM2.5 background concentrations were obtained from the EPA AIRS monitor 481410037 located at 250 Rim Rd, El Paso, El Paso County. This monitor is continuous. As discussed in the Page memo, "due to the important role of secondary PM 2.5, background monitored concentrations of PM 2.5 are likely to be more homogenous across the modeling domain in most cases, compared to other pollutants."<sup>7</sup>

The Protestants also argue the ADMT's analysis was flawed because any formation of secondary PM 2.5 will exceed the SIL and require a full impacts analysis.<sup>8</sup> In the guidance provided following the *Sierra Club* opinion<sup>9</sup>, however, EPA provides that states with SIP-approved PSD programs should issue permits in a manner consistent with EPA guidance for

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<sup>3</sup> Exhibit ED-26 at 513 (TCEQ Air Quality Modeling Guidelines, 1.3 Guidance Philosophy).

<sup>4</sup> TR at 498-499; Exhibit ED-23 at 448.

<sup>5</sup> Aligned Protestants at 31.

<sup>6</sup> Aligned Protestants at 30.

<sup>7</sup> Exhibit ED-29

<sup>8</sup> Aligned Protestants at 31.

<sup>9</sup> *Sierra Club v U.S. EPA*, 705 F.3d 458 (D.C. Cir. 2013).

SILs. EPA states that “it would be sufficient in most cases for permitting authorities to conclude that a proposed source with the PM<sub>2.5</sub> impact below the PM<sub>2.5</sub> SIL value will not cause or contribute to a violation of the PM<sub>2.5</sub> NAAQS and to forgo a more comprehensive cumulative modeling analysis for PM<sub>2.5</sub>.”<sup>10</sup> Therefore, there will be no violation of the NAAQS or PSD Increment, and further analysis is not required.<sup>11</sup>

#### **IV. PRECONSTRUCTION CONTINUOUS MONITORING**

##### **PM<sub>2.5</sub> Background Concentration Monitoring**

The Protestants except to the ALJ’s opinion that EPE’s permit application contains adequate continuous and representative ambient PM<sub>2.5</sub> monitoring data. However, there was no requirement to include preconstruction monitoring data in the permit application at the time EPE submitted its application and air quality modeling demonstration to the TCEQ. The D.C. Circuit did not issue the Sierra Club opinion that would have required preconstruction monitoring until the date of the preliminary hearing in this case on January 22, 2013. The Protestants argue that failure to submit PM<sub>2.5</sub> preconstruction monitoring data in the application post Sierra Club requires a denial of the permit.<sup>12</sup> Although not required, El Paso Electric did provide PM<sub>2.5</sub> monitoring data from a continuous monitor to the parties during the discovery process. This information was subsequently admitted to the record during the hearing.<sup>13</sup>

Additionally, ED expert Justin Cherry testified the remand of the SILs did not affect his opinion regarding the modeling analysis submitted by El Paso Electric because EPA has stated, in guidance, that permitting authorities may continue to apply SILs for PM<sub>2.5</sub> to support a PSD permitting decision as long as the permitting authorities ensure that the SILs are not used in a manner that is inconsistent with the requirements of § 165(A)(3) of the Clean Air Act.<sup>14</sup> Section 165(a)(3) lists the criteria for ensuring emissions from construction or operation of the facility will not cause or contribute to air pollution. In addition, the results of the analysis conducted by the ADMT verified the Applicant’s conclusion that the proposed project is protective of the PM<sub>2.5</sub> NAAQS and Increment.<sup>15</sup> Similarly, Mr. Cherry testified the remand of the SMCs did not change his opinion regarding the modeling analysis because the draft modeling guidance states

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<sup>10</sup> Exhibit ED-38 at 771 (Circuit Court Decision on PM 2.5 Significant Impact Levels and Significant Monitoring Concentration).

<sup>11</sup> Exhibit ED-17 at 385, 387; Exhibit ED-23 at 458, 460.

<sup>12</sup> Aligned Protestants at 32.

<sup>13</sup> See El Paso Electric Ex. 123 and 303.

<sup>14</sup> Exhibit ED-23 at 457;

<sup>15</sup> Exhibit ED-23 at 457.

that applicants may continue to meet the preconstruction monitoring requirements by using data from existing monitors that are determined to be representative of background conditions in the affected area.<sup>16</sup> The monitor used by the ADMT for the PM2.5 analysis is representative of background conditions in the affected area.<sup>17</sup> TCEQ supports the ALJ's FOF Nos.32, 38, 47, 50-53, and 135 and COL Nos. 4, 5, 7, 8, 12, 22, and 52-54.

## **V. OTHER**

### **Environmental Justice**

The Protestants except to the ALJ's finding and conclusion that EPE satisfied all applicable statutory and regulatory requirements for an air permit application. The Protestants argue that El Paso Electric and TCEQ failed to conduct an environmental justice evaluation as required by Title VI of the Civil Rights Act. However, in the discussion in the PFD, the ALJ noted that the Protestants failed to offer evidence into the record that would support the requirement of such a review.

The Protestants also state in their exceptions that El Paso Electric failed to comply with public outreach required by environmental justice and that nearby residents were deprived of meaningful public participation.<sup>18</sup> However, as discussed by the ALJ in the PFD, the ED directs applicants to provide public notice as required by commission rules, in accordance with statutory requirements. The ED agrees with the ALJ's opinion that EPE satisfied the public notice requirements in 30 TAC Chapter 39.

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<sup>16</sup> Exhibit ED-23 at 460-461.

<sup>17</sup> Id.

<sup>18</sup> Aligned Protestants at 50-51.

## **VI. Conclusion**

The Executive Director agrees with the Administrative Law Judge and respectfully requests that the Commissioners approve the Proposal for Decision and Findings of Fact and Conclusions of Law, and issue the draft permit.

Respectfully Submitted,  
Texas Commission on Environmental Quality

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Representing the  
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## **CERTIFICATE OF SERVICE**

I certify that on this the 31<sup>st</sup> Day of October, 2013, a true and correct copy of the foregoing document has been served upon all parties, via electronic filing and e-mail transmission to the addresses listed below:

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